Md Desa bin Hashim v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–56–92
ANUAR CJ (MALAYA), WAN ADNAN FCJ AND GOPAL SRI RAM JCA
22 AUGUST 1995

Evidence *— Confession — Voluntariness — Standard and burden of proof — Test partly objective and partly subjective — Whether exception in s 27 subject to s 24 — Evidence Act 1950 ss 24, 25, 26 & 27*

Evidence *— Confession — Information leading to fact discovered — Admissibility depends on voluntariness — Fact must not already be known to police — Evidence Act 1950 ss 24, 25, 26 & 27*

Criminal Procedure *— Judge — Duty of judge — Voluntariness of statement challenged — Whether judge should hold voire dire — Whether failure to hold voire dire a non-direction — Whether substantial miscarriage of justice caused*

Criminal Procedure *— Trial — Security case — Close of prosecution's case — Duty of court — Submission of no case to answer not made —Whether judge can acquit accused — Essential (Security Cases) (Amended) Regulations 1975 reg 13*

The appellant has appealed against his conviction by the High Court at Kangar on two amended charges under s 57(1)(a) and (b) of the Internal Security Act 1960, respectively, for having in his control a revolver and seven bullets. The trial of the appellant was conducted under the provisions of the Essential (Security Cases) (Amendment) Regulations 1975 ('the ESCAR'). The appeal was based upon the admissibility of two incriminating statements made by the appellant on 1 September 1988. The first was made by the appellant during interrogation by Insp Zamri ('PW1'), who recorded the statement in a diary. During the cross-examination of PW1, it was put to him that the appellant was assaulted during interrogation and was also induced into giving evidence in return for the release of his younger brother who was arrested before him. The second statement was made shortly after the first statement during discovery of the revolver and ammunition at the place mentioned by the appellant in the first statement. The appellant denied making the two incriminating statements and having led the police to the discovery of the offending exhibits. The trial judge, however, admitted the two incriminating statements, relying on s 27 of the Evidence Act 1950 ('the Act'), as being information leading to the discovery of a fact. The judge found him guilty and sentenced him to the mandatory death sentence. The appellant has appealed to the Federal Court.

Held, allowing the appeal:

(1) In order for a confession or other statement or information to qualify for admission under s 27, it must have been made voluntarily. A discovery made in consequence of a confession

extracted by illegitimate means in the sense described in s 24 of the Act is inadmissible. When a challenge is taken as to the voluntariness of the information, it is imperative for a trial judge to determine that issue upon the voire dire.

(2) The burden of proving beyond reasonable doubt that a confession is voluntary lies upon the prosecution. The test to determine voluntariness is partly objective and partly subjective. The rule permitting admissibility contained in s 27 is an exception to the prohibition appearing in ss 25 and 26 but all these three sections are governed by and are subject to s 24. Here, there was sufficient evidence to create a reasonable suspicion that the first statement was made under illegitimate pressure and therefore not voluntary.

(3) It is the duty of the judge to determine the issue of voluntariness upon a voire dire at the very first suggestion of impropriety. This issue was never considered by the judge and was a serious non-direction amounting to a misdirection. A misdirection by a judge of himself is to be treated as a misdirection by a judge to a jury. The effect of the misdirection was to allow inadmissible evidence in the trial which formed the basis of the conviction and, therefore, had occasioned a substantial miscarriage of justice.

(4) The second statement was also inadmissible since it was made shortly after the first statement and the prosecution had failed to prove beyond a reasonable doubt that all traces of inducement had been removed at the time it was made. Furthermore, as the discovery was not made in consequence of the second statement, it was plainly inadmissible under s 27 of the Act.

(5) Although a submission of no case to answer was not made at the close of the prosecution case, it is the duty of the court to intervene and set right any miscarriage of justice that may have resulted in consequence. Here, the trial judge should not have called upon the appellant to make his defence but should have acquitted him upon both charges at the close of the prosecution case despite the language of reg 13 of the ESCAR.

[Bahasa Malaysia summary

Perayu telah membuat rayuan terhadap sabitannya oleh Mahkamah Tinggi di Kangar atas dua pertuduhan yang dipinda di bawah ss 57(1)(a) dan (b) Akta Keselamatan Dalam Negeri 1960 masing-masing, kerana mempunyai dalam kuasanya sepucuk pistol dan tujuh butir peluru. Perbicaraan perayu telah dijalankan mengikut peruntukan di bawah Peraturan-Peraturan Perlu (Kes-Kes Keselamatan) (Pindaan) 1975 ('PPKK'). Rayuan ini berdasarkan kebolehterimaan dua pernyataan yang dibuat oleh perayu pada 1 September 1988 yang menunjukkan bahawa beliau adalah bersalah. Pernyataan pertama dibuat oleh perayu semasa soal siasat oleh Insp Zamri ('SP1'), yang telah merekodkan pernyataan itu di dalam sebuah diari. Semasa pemeriksaan balas SP1, cadangan telah dikemukakan kepadanya bahawa perayu telah diserang semasa soal

siasat dan juga telah didorong untuk memberi keterangan supaya pihak polis melepaskan adiknya yang telah ditangkap sebelumnya. Pernyataan kedua telah dibuat tidak lama selepas pernyataan pertama itu semasa penemuan pistol dan amunisi di tempat yang disebut oleh perayu dalam pernyataan pertamanya. Perayu menafikan bahawa beliau telah membuat dua pernyataan tersebut yang menunjukkan bahawa beliau bersalah dan menafikan bahawa beliau telah membawa polis ke tempat penemuan ekshibit itu. Walau bagaimanapun, hakim perbicaraan telah membenarkan dua pernyataan tersebut, bergantung pada s 27 Akta Keterangan 1950 ('Akta itu'), kerana mereka merupakan maklumat yang telah membawa kepada penemuan suatu fakta. Hakim mendapati beliau bersalah dan telah menjatuhkan hukuman mati mandatori. Perayu telah membuat rayuan kepada Mahkamah Persekutuan.

Diputuskan, membenarkan rayuan itu:

(1) Supaya suatu pengakuan salah atau kenyataan atau maklumat layak diterima di bawah s 27, ia mestilah dibuat secara sukarela. Suatu penemuan yang dibuat sebagai akibat suatu pengakuan salah yang diperolehi secara haram mengikut makna s 24 Akta itu tidak boleh diterima. Di mana cabaran dibuat tentang kesukarelaan sesuatu maklumat itu, adalah sangat mustahak bahawa hakim perbicaraan mesti menentukan isu itu di dalam voire dire.

(2) Beban membuktikan sehingga melampaui keraguan munasabah bahawa pengakuan salah dibuat secara sukarela dipikul oleh pihak pendakwa. Ujian untuk menentukan kesukarelaan adalah separuh objektif dan separuh subjektif. Rukun kebolehterimaan yang terkandung di dalam s 27 adalah suatu kekecualian kepada larangan di dalam ss 25 dan 26 tetapi ketiga-tiga seksyen ini dikuasai dan tertakluk kepada s 24. Di sini, terdapat keterangan yang mencukupi untuk mewujudkan syak yang munasabah bahawa pernyataan pertama dibuat secara paksaan yang tak sah dan oleh itu adalah tidak sukarela.

(3) Adalah menjadi kewajipan hakim untuk menentukan isu kesukarelaan dengan mengadakan 'voire dire' apabila terdapatnya sedikit tanda kesalahan. Isu ini tidak dipertimbangkan oleh hakim perbicaraan dan ini merupakan ketakarahan yang merupakan suatu salah arah. Suatu salah arah diri sendiri oleh hakim dianggap sebagai salah arah daripada hakim kepada juri. Salah arah itu telah mengakibatkan keterangan tidak boleh terima dibenarkan di dalam perbicaraan dan ia telah membentuk asas sabitan itu dan, dengan demikian, membawa kepada salah laksana keadilan yang berat.

(4) Pernyataan kedua juga tidak boleh diterima kerana ia telah dibuat sejurus selepas pernyataan pertama dan pihak pendakwa telah gagal membuktikan sehingga melampaui keraguan munasabah

bahawa semua kesan dorongan telah disingkir pada masa ia dibuat. Lagipun, oleh kerana penemuan itu tidak dibuat sebagai akibat pernyataan kedua itu, ia jelas tidak boleh diterima di bawah s 27.

(3) Walaupun penghujahan tiada kes untuk dijawab tidak dibuat pada penutup kes pihak pendakwa, ia adalah kewajipan mahkamah untuk bercampur tangan dan membetulkan sebarang salah laksana keadilan yang mungkin diakibatkan. Di sini, hakim perbicaraan tidak sepatutnya memanggil perayu untuk membuat pembelaannya tetapi seharusnya membebaskan beliau atas kedua-dua tuduhan itu pada penutup kes pihak pendakwa meskipun bahasa peraturan 13 PPKK tidak bermaksud demikian.]

Notes

For cases on confessions, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 417–512.

For a case on the duty of a judge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1418.

For cases on trials, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2828–3189.

Cases referred to

Birch, Sandra Margaret v PP [1978] 1 MLJ 72 (folld)
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321 (folld)
Joshi v State AIR 1968 Punj 120 (folld)
Lee Weng Sang v PP [1978] 1 MLJ 168 (folld)
Lim Sing Hiaw v PP [1965] 1 MLJ 85 (folld)
Mohamed Yusof bin Haji Ahmad v PP [1983] 2 MLJ 167 (folld)
Mokhtar bin Hashim, Dato & Anor v PP [1983] 2 MLJ 232 (folld)
Mraz v R (1955) 93 CLR 493 (refd)
Packiam & Anor v PP [1972] 1 MLJ 247 (refd)
PP v Chong Boo See [1988] 3 MLJ 292 (folld)
PP v Kasmin bin Soeb [1974] 1 MLJ 230 (refd)
PP v Law Say Seck & Ors [1971] 1 MLJ 199 (folld)
PP v Liew Sam Seong [1982] 1 MLJ 223 (folld)
PP v Sihabduin bin Hj Salleh & Anor [1980] 2 MLJ 273 (folld)
Pulukuri Kottaya v King Emperor LR 74 IA 65 (folld)
R v Ramasamy [1965] AC 1 (refd)
Ramkishan Mithanlal Sharma & Ors v State of Bombay AIR 1955 SC 104 (folld)
Ratten v R (1974) 131 CLR 510 (refd)
Selvadurai v PP [1948–49] MLJ Supp 43 (folld)
Tai Chai Keh v PP [1948–49] MLJ Supp 105 (refd)
Tan Han Seng, Johnson v PP [1977] 2 MLJ 66 (folld)
Tan Hua Lam v PP [1966] 1 MLJ 147 (folld)
Vijay Kumar v State of Himachal Pradesh (1978) Crim LJI 1619 (folld)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 92(1)
Evidence Act 1950 ss 24, 25(1), 26(1), 27(1)
Internal Security Act 1960 ss 57(1)(a), (b), 75(1)
Esential (Security Cases) (Amendment) Regulations 1975 regs 13, 21, 23
Crimes Act 1958 s 568(1) [Vic]
Criminal Appeal Act 1912 s 6(1) [NSW]

Appeal from: Criminal Trial No 47–18–91 (High Court, Kangar)

Harpal Singh (*Harpal Singh & Co*) for the appellant.
Kamaruzaman bin Abdul Jalil (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): The appellant was convicted by the High Court at Kangar on two amended charges under s 57(1)(a) and 57(1)(b) of the Internal Security Act 1960, respectively, for having in his control a Colt .38 Special revolver and seven .38 Special bullets. The weapon formed the subject matter of the first amended charge, while the ammunition formed the subject matter of the second amended charge. The trial of the appellant was conducted under the provisions of the Essential (Security Cases) (Amendment) Regulations 1975 ('the ESCAR'). The conviction of which we have spoken a moment ago resulted in passing of the mandatory sentence of death upon the appellant. Against this conviction, the appellant appealed to this court.

We heard this appeal on 7 August 1995. At the conclusion of arguments, we allowed the appeal and acquitted the appellant. We now give the reasons for our decision.

The brief facts as revealed during the prosecution's case are as follows. On 1 September 1988, the appellant was being held in custody at the Alor Setar police station. On that day, at about 2.05pm, the appellant was interrogated by an Insp Zamri (PW1). No evidence was adduced in the court below as to why the appellant had been taken into custody or to what purpose the interrogation was directed. The only evidence on the point is that of PW1 who merely said that the OCPD, Alor Setar had entrusted him with the responsibility of interrogating the appellant.

According to PW1, the appellant, while under interrogation, made a statement concerning the whereabouts of the weapon and ammunition in question. It is common ground that no caution of any sort was administered to him before he made that statement. However, the record does show a reference, at a very early stage in the proceedings, by the learned deputy who appeared at the trial, to s 27 of the Evidence Act 1950 and to reg 23 (we believe that the learned judge's note should read as 'reg 21') of the ESCAR. This was in response to the objection taken by defence counsel to the admissibility of statements made by the appellant during the

A interrogation. We shall deal with this aspect of the case at some length later in this judgment

Later, PW1 recorded this statement in a diary. It was not his official diary. He wrote it on the page reserved for 30 January 1988, not 1 September 1988. The learned judge reproduced the whole of that entry B in his judgment. In view of its importance, we shall do likewise. This is what PW1 wrote:

> Saya keluar penjara tahun 1986 selepas saya melakukan kes dengan bersenjatakan pistol dan pecah rumah di kawasan Alor Setar, Jitra dan pistol yang gunakan masih ada saya simpan di Hutan Aji, Perlis di tepi sebuah sungai ditutup dengan rumput dan saya akan tunjuk nanti.

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This record of what the appellant is supposed to have said to PW1 was produced as exh P2. At that stage, the learned deputy conducting the prosecution informed the learned judge that there were several words in exh P2 which were prejudicial to the appellant and applied to expunge D these. That application was granted by the learned judge. We refrain from making any comment upon the correctness of the order made by the learned judge since the approach that we have taken in this appeal renders it unnecessary for us to deal with this aspect of the case.

We now return to the narrative. PW1 concluded his interrogation of the appellant at about 3pm. At about 3.30pm, PW1 proceeded to the place E mentioned by the appellant. He was accompanied by the appellant and seven other police personnel. These included the police photographer Police Constable Thajmi (PW3) and Police Constable Mat Akhir (PW2).

On arrival at the scene, the appellant led PW1, PW2, PW3 and a Sergeant Omar to a place approximately 5m from the place at which the F van in which they had travelled was parked. PW1 then instructed PW3 to take photographs at the scene. After this instruction had been given, the appellant spoke to PW1 and said: 'Di situ saya simpan beg yang mengandungi pistol.'

At the trial, counsel opposed the admission of this second discovery G statement. The learned deputy conducting the prosecution relied on s 27 once again. The learned judge then overruled the objection and allowed the statement to be adduced in evidence.

Continuing his evidence, PW1 informed the court that when making this second statement, the appellant pointed to a place between a nearby H stream and the dirt track adjacent to it. It was an area covered with bushes. The appellant then parted some of these bushes and among them PW1 saw a black bag from which was recovered a plastic bag containing the offending exhibits.

Later, at about 5.35pm, on the same day, PW1 returned to the scene I accompanied by the appellant, an Insp Haris (PW5), who was the investigating officer, and other police personnel. It appears from the record that the exhibits were taken along as well and that more photographs were taken at the scene. Why this exercise was undertaken does not appear to have been sufficiently explained at the trial.

The evidence of PW1 under cross-examination may be summarized as follows. Before the appellant's arrest, his younger brother, Azmi bin Hashim, had been arrested and was in custody when the appellant made the impugned statement. It was put to PW1 that Azmi had been present during the interrogation of the appellant and that both of them had been assaulted by PW2 on PW1's instructions. That suggestion was denied by PW1, as was the suggestion that the information as to the whereabouts of the revolver and ammunition could have come from Azmi. PW1 however agreed with counsel that the place from which the offending exhibits were recovered was an open space accessible to all and sundry. He also conceded that the appellant's brother was released from custody after the recovery of the weapon and the ammunition.

PW1 was also cross-examined about the page in the diary in which he wrote the incriminating words. He said that he did not write them in his official diary because it was not with him at the time. He conceded that he had not written it into his official diary at any later point in time. He also testified that he was able to recall and rewrite those very words in court if required to do so.

The remainder of the prosecution evidence consisted of the testimony of some of the police personnel who had accompanied PW1 and the appellant to the scene. We, however, pause to make mention of the fact that on 3 September 1988, one Insp Khairi recorded a statement from the appellant pursuant to the provisions of s 75(1) of the Internal Security Act 1960, after administering the form of caution prescribed by the proviso to that section. An attempt by the prosecution to admit that statement failed. The learned judge gave no reasons for rejecting the statement. Nevertheless, we find it significant that during his evidence upon the voire dire the appellant alleged that he had placed his thumbprint upon the cautioned statement in exchange for the release of his younger brother from police custody.

At the close of the prosecution's case, the learned judge held that there was a case for the appellant to answer and accordingly called upon him to make his defence. The appellant was the sole witness for the defence. He elected to give evidence on oath. He denied having made the incriminating statement in exh P2 or having led PW1 and his team to the discovery of the offending exhibits. He said that he had been taken to the scene and forced to pose for the several photographs that had been taken there by PW3. The record reveals the cross-examination of the appellant to have been extremely brief. In essence it was put to him that he was being untruthful. He denied this and was unsurprisingly not re-examined. The learned trial judge then heard submissions at the close of the whole case and came to the conclusion that the appellant was guilty of the offence charged and sentenced him according to law.

We next turn to consider the reasons given by the learned judge for his decision. In view of the comments we propose to make about the approach taken by the learned judge, it is necessary to quote him in extenso. After having reproduced the whole of exh P2 he proceeded as follows:

A In the course of the trial, on application of learned DPP, the court expunged from P2 the following:

(i) words 'yang digunakan' in line 6; and

(ii) other words not mentioned by PW1 in court.

On the same date at about 4.15pm on arrival at Kampung Behor Gelam, B Perlis, T led PW1 and his men to a spot and said: 'Di situ saya simpan beg yang mengandungi pistol', at the same time pointing at the bushes in between a dirt track and a stream. Next, T pushes aside (selak) the grasses (rumput-rumput) after which a black bag (P3) was noticeable. On instruction of PW1, T retrieved the bag and handed it to PW1.

Among other things, the bag contained a pistol (P9) and seven live C bullets (P10, 11) of which six were in the chamber of the pistol. Subsequently, PW1 lodged police reports and handed over the pistol and bullets to investigating officer Insp Haris (PW5).

PW1's evidence was subsequently corroborated by the evidence of Mohd Akhir (PW2) and the photographs (P12A–G) taken at the scene of incident by Cpl Thajmi (PW3).

D Evidence on record clearly established that T gave a statement to PW1, which statement led distinctly to the discovery of the impugned exhibits (P9, 10, 11).

Relying on the foregoing and on the authority of *Chong Soon Koy v PP* [1977] 2 MLJ 78; *Lau Kee Hoo v PP* [1984] 1 MLJ 110, I find and so hold E that the impugned exhibits were in possession of T at the material time when they were found hidden in the bushes at the scene of incident.

...

At the close of the prosecution's case, I am satisfied that T had a case to answer. No submission of no case to answer was made.

F T gave evidence on oath. In his defence, T said that he had no knowledge of the whereabouts of the impugned exhibits. It was the police who led T to the scene of incident. The police knew the scene of incident through T's brother (Azmi bin Hashim), so it was alleged.

It may be noted that, in the defence's case, T made no mention about the other exhibits (P3–8) found together with the impugned exhibits.

G In essence, it would appear that the defence's case was founded on the allegation in that the police had prior knowledge of the whereabouts of the impugned exhibits.

If it was true that Azmi had told the police regarding the whereabouts of the impugned exhibits, based on natural probabilities of human conduct and consistent with the duty of a police officer, PW1 would have caused H Azmi to lead him to the scene of incident. Had T been innocent, why should PW1 incriminate T at all? There was no evidence to imply that any of the police witnesses had oblique motive against T. In absence of some credible evidence I regard the defence's case as wholly far-fetched and inherently incredible. I do not believe that the case against T was a frame up.

I On the other hand, I find the evidence of the police witnesses to be substantially consistent with one another. They appeared to be honest and reliable and I have no hesitation in accepting their evidence.

At material time, the bag (P3) containing impugned exhibits was found in the bushes near a dirt track, where the general public had access. Had the

bag containing the impugned exhibits been wholly or partly exposed, being valuable merchandise, a passerby would have retrieved it. However, as stated by PW1, the bag was not noticeable until T pushed aside (selak) the grasses.

In my judgment, I am satisfied that the prosecution had proven his case beyond reasonable doubt as charged. On the other hand, considering the evidence in totality taken together with the surrounding circumstances and demeanour of T, the defence had failed to raise any reasonable doubt as to the guilt of T. In the event, I find T guilty of both charges, convict him and sentence him to suffer death by hanging according to law.

Having considered the material on record most carefully, we are satisfied that there are several unsatisfactory features in this case by reason of which the conviction against the appellant cannot be sustained. We shall deal with each of these in turn.

We begin by considering the two statements said to have been made by the appellant: the first at the police station and the second at the scene. The learned judge admitted these relying upon s 27 of the Evidence Act 1950. He based his decision upon them. It is beyond question that these statements form the fulcrum upon which the whole case turns. If it is found that these vital pieces of evidence were wrongly admitted and relied upon, then it would follow, as night follows day, that there was no material upon which a conviction on either charge could be properly founded. It is therefore necessary to first determine the admissibility of each statement and this we now proceed to do.

It is appropriate to commence by setting out so much of those statutory provisions in the Evidence Act 1950 as are relevant for present purposes and within the scheme of which s 27 is accommodated. They are as follows:

24 A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

25(1) Subject to any express provision contained in any written law, no confession made to a police officer who is below the rank of Inspector by a person accused of any offence shall be proved as against that person.

(2) (*Repealed*).

26(1) Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Sessions Court Judge or Magistrate, shall be proved as against that person.

(2) (*Repealed*).

27(1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the

A custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

(2) (*Repealed*).

The meaning of these sections have been fairly worked out in the numerous B decided cases and we consider the following propositions to be well settled.

First, the burden of proving, beyond a reasonable doubt, that a confession is voluntary lies throughout upon the prosecution: *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232; *PP v Chong Boo See* [1988] C 3 MLJ 292.

Secondly, the phrase 'appears to the court' contained in s 24 refers to of a set of circumstances, adduced in evidence, which point to a well grounded suspicion that the confession was involuntary: *PP v Law Say Seck & Ors* [1971] 1 MLJ 199; *Sandra Margaret Birch v PP* [1978] 1 MLJ 72; *Mohamed Yusof bin Haji Ahmad v PP* [1983] 2 MLJ 167. D

Thirdly, the test to be applied in determining whether a confession was born of a free mind and will, untainted by any pressure, oppression or other vitiating element is partly objective and partly subjective: *Dato Mokhtar bin Hashim & Anor v PP*. Very slight inducement is sufficient to render a confession inadmissible: *Selvadurai v PP* [1948–49] MLJ Supp 43. E

Fourthly, by reason of s 27, so much of a statement made by an accused in police custody as leads to the discovery of a fact, notwithstanding that it amounts to a confession, is admissible in evidence. When admitted, it may go to prove such facts as are relevant to bring home the charge. These include, but are not confined to, knowledge on the part of an F accused of certain relevant matters, the fact that the accused had possession of the article found or that the article in question was under his control: *Pulukuri Kottaya v King Emperor* LR 74 IA 65.

Fifthly, in a number of Indian cases it has been held that the rule permitting admissibility contained in s 27 is an exception to the prohibition G appearing in the two sections that immediately precede it but does not qualify the all pervading qualification enacted in s 24: see, *Ramkishan Mithanlal Sharma & Ors v State of Bombay* AIR 1955 SC 104; *Vijay Kumar v State of Himachal Pradesh* (1978) Crim LJI 1619. The former decision was applied in *Yee Ya Mang v PP* [1972] 1 MLJ 120. The decisions of the Privy Council in *R v Ramasamy* [1965] AC 1 at p 13 and of Chang Min H Tat J (as he then was) in *Packiam & Anor v PP* [1972] 1 MLJ 247 appear to support the proposition. Put in another fashion, the principle is that ss 25 and 26 are subject to s 27 but all these three sections are governed by and are subject to s 24.

We have no difficulty in affirming the correctness of the proposition I as stated in the Indian cases to which we referred a moment ago. Having regard to the language of each of the sections which we have set out and the sequence in which they have been legislatively framed, it is abundantly clear, in our judgment, that in order for a confession or other statement or information to qualify for admission under s 27, it must have been made

voluntarily. A discovery made in consequence of a confession extracted by illegitimate means in the sense described in s 24 is inadmissible. When a challenge is taken as to the voluntariness of the information, it is imperative for a trial judge to determine that issue upon the voire dire.

There are good reasons of policy for the existence of the rule we have just stated. An accused may know nothing more than that the subject matter of the charge, eg drugs or a firearm has been concealed in a particular place. But that fact alone may be insufficient to found a conviction. See, for example, *Tai Chai Keh v PP* [1948–49] MLJ Supp 105 at p 110; *PP v Kasmin bin Soeb* [1974] 1 MLJ 230. Now, if such an accused person, in consequence of some threat, promise, inducement, pressure or oppression brought to bear upon him, admits that he was the author of the concealment, then, what possible value could that statement have? No doubt, he is capable of leading the police to the scene of the concealment resulting in a recovery of the offending article. But that is not because he concealed it there. It is based upon his knowledge acquired earlier, of the whereabouts of the particular exhibit. When viewed in this way, it is not difficult to see that the interpretation we place upon these sections, and in particular upon s 27, truly represents legislative intent.

Sixthly, s 27 should be read strictly so that its precise terms are met. Thus, the discovery referred to in the section must be in consequence of information given by the accused. If an investigating agency has prior knowledge of the whereabouts of the article that is recovered, then the section does not apply. The careful and illuminating judgment of Mohamed Azmi J (as he then was) in *PP v Liew Sam Seong* [1982] 1 MLJ 223 is authority for that proposition. Therefore, in a case where the accused makes more than one statement in relation to the whereabouts of a particular thing, it is only the first statement that is admissible; the second is not: *Joshi v State* AIR 1968 Punj 120.

Seventhly, the propositions we have thus far set out apply with equal force to a trial conducted under the provisions of the ESCAR, notwithstanding the wide language of reg 21 thereof: *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66 at p 72.

Turning now to the merits of the present appeal, it is apparent from the record that there were in essence two questions which called for resolution by the trial court at the close of the case for the prosecution. The first was whether the appellant did in fact make the statements attributed to him; the second, whether the statements, if made by the appellant, were voluntary.

As may be seen from his judgment, the learned judge, at the close of the whole case, resolved the first question in favour of the prosecution. This he was perfectly entitled to do. It is a question of fact upon which the learned judge, having had an audio-visual advantage, was eminently in a better position than this court to arrive at a concluded view. In accordance with settled principles, we decline to interfere with the learned judge's finding upon the first issue.

We now proceed to consider the second question, namely, whether the appellant made the statement contained in P2 voluntarily. Here two

A separate matters arise for comment. The first relates to the procedure which the learned judge ought to have adopted, while the second concerns the very issue of admissibility itself. However, before we deal with each of these, it is necessary to make some preliminary remarks upon a matter of some importance.

B Now, it is true, as observed by the learned judge that a submission of no case to answer was not made by counsel for the appellant at the close of the prosecution's case. But that omission does not preclude this court from determining whether procedural fairness according to law was meted out to the appellant during the course of the prosecution's case. If this C court is satisfied that, at that stage of the proceeding, there was withheld from the appellant the benefit of a rule operating in his favour, then, it is the duty of this court to intervene and set right any miscarriage of justice that may have resulted in consequence. With that, we now proceed to address our minds to the two points earlier mentioned.

D First, there is the question of the procedure that ought to have been followed. It is clear, from those passages in the record reproduced earlier in this judgment, that very early in the proceedings, counsel for the appellant objected to the admissibility of the statement made by the appellant to PW1. That objection was overruled. Later, during the cross-examination of PW1, counsel asked questions directed to show that E illegitimate pressure had been brought to bear upon the appellant during his interrogation. The cross-examination of PW2 was conducted along similar lines. The nature of the challenge taken put in issue the voluntariness of the whole of the statement contained in exh P2, including so much of that statement as is said to have led to the recovery of the weapon and the F ammunition. In these circumstances, it is quite plain where the duty of the learned judge lay. He ought, at the very first suggestion of impropriety on the part of PW1, to have directed that the issue of voluntariness be tried as a separate issue: *Lee Weng Sang v PP* [1978] 1 MLJ 168 at p 171. This he omitted to do. His omission amounts, in our judgment, to a serious departure from the fundamental rules governing a criminal trial. It warrants G appellate interference.

It now becomes necessary to move to the second point, namely, the admissibility of the discovery statement contained in exh P2 on the ground of involuntariness. That this aspect of the case was never considered by the learned judge is apparent from his written reasons from which we have H quoted at some length. Yet, there was ample material upon which the learned judge could have acted.

As earlier observed, it was put to PW1 that he had instructed PW2 to apply physical pressure upon the appellant during the latter's interrogation. There was also the suggestion, made during the proceedings I conducted to decide upon the admissibility of the cautioned statement, that the freedom of the appellant's younger brother, Azmi, was at stake. Brotherly affection is a powerful inducement and may well have caused the making of the statement to PW1. To all this may be added the fact that Azmi was indeed released after the discovery of the relevant exhibits.

In our judgment, it was essential for the learned judge to have properly weighed and considered all these matters. We are of opinion that the circumstances to which we have referred, when taken together, are sufficient to create a reasonable suspicion in the mind of a court that the whole of the statement in exh P2 was involuntary — the product of a mind which was tainted with pressure. Further, we are left in no doubt that if the learned judge had hearkened to the evidence and directed his mind to those principles of law which we have adverted to earlier in this judgment, he would have held that the prosecution had failed to prove that the first disclosure made by the appellant to PW1 was voluntary.

Having come to this conclusion it becomes necessary to consider the consequence of the learned judge's failure to direct himself on these points. Upon this question the power, and indeed the duty, of this court is clear. It is summed up in the following words of Edgar Joseph Jr SCJ in *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321 at p 331:

> Now, an appellate court is entitled to interfere with a finding of fact relating to the voluntariness of a confession if that finding has been arrived at without applying the true and relevant legal tests and consideration of relevant matters. (*Sarwan Singh v State of Punjab* AIR 1957 SC 637; *PP v Thum Soo Chye* [1954] MLJ 96.

His Lordship, in the passage cited, was, of course, referring to a case where the trier of fact had addressed his mind upon the issue of voluntariness but came to the wrong conclusion. But we here have a much stronger case: it is a case in which the issue was never considered. This is a serious non-direction which in our judgment amounts to a misdirection. The effect of this misdirection is that inadmissible evidence was let in and used to found the basis of a conviction. Bereft of the inculpatory statement which is said to have led to the discovery of the weapon and the ammunition, so much of the prosecution's case as depends upon the impugned statement collapses like a house of cards.

This much said, what remains for consideration is the second discovery statement made by the appellant at the scene of the recovery. On the strength of the sixth proposition earlier formulated, this second statement was plainly inadmissible and ought to have been excluded upon the objection of counsel which we hold was well taken.

But there is an added reason for the exclusion of this statement. It is this. The second discovery statement was made very shortly after the first. Since the prosecution had failed to prove that the first statement had been made voluntarily, it was their bounden duty to prove beyond a reasonable doubt that at the time the second statement was made at the scene, all traces of the inducement that had earlier operated upon the appellant's mind had been removed or had ceased: *Lim Sing Hiaw v PP* [1965] 1 MLJ 85 at p 89; *Tan Hua Lam v PP* [1966] 1 MLJ 147. In this context, we consider the following passage in the judgment of Thomson LP in *Lim Sing Hiaw v PP* to be relevant:

> But that was not all there was to it. The appellant also said that for three days after he was caught by the soldiers and before he came into the hands

of Insp Lingam he was in the hands of members of the special branch and that during this time they elicited from him a statement (he did not say whether in the same terms as the statement he made to Insp Lingam) by showing him the body of his friend who had been killed on 23 August and threatening that if he did not make a statement he himself would be taken out into the jungle and shot and photographs of his body taken and his relatives informed that he has been killed in action.

This part of the appellant's evidence may or may not have been entirely true, indeed it may not have been true at all. It was, however, uncontradicted. *Moreover, there is nothing inherently improbable about it.* We are not for one moment imputing any impropriety to members of the special branch. It must, however, be remembered, and I think we all have knowledge of this, that at this time the country was very disturbed and was full of rumours as to the presence of invaders from across the sea. Some of the persons seen in company with the appellant were still at large. There was every reason to think the appellant was associated with the invaders and it is highly probable that special branch officers did endeavour to elicit some information from him; indeed they would have been failing in their duty if they had not done so, and if they uttered threats who could blame them? It was their business to get information and to get it quickly and they were not concerned with anything that might happen later in the way of prosecuting the appellant.

At the trial, however, no attempt was made to call any police or army officer who could say what happened to the appellant during the three days he was in custody prior to making his statement to Insp Lingam. In the circumstances we think the trial judge should have accepted it that at the lowest there might well be some truth in the appellant's uncontradicted story and that the appellant made some sort of statement previously. *It would then have been necessary for the prosecution to show that something was done by Insp Lingam to remove any impression that might have been made by any threats or promises that might have been used to induce the appellant to make that previous statement.* The present state of the law on this point was thus stated by Parker CJ in the case of *Smith* 43 Cr App R 121 at p 129:

> 'Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.'

Nothing of the sort was done and we are therefore compelled to say that the prosecution failed to show that the appellant's statement was voluntary and so we must hold that it was wrongly admitted. (Emphasis added.)

The record shows that all these points were not considered at all by the learned judge despite objection to admissibility having been taken. Consequently, we are of opinion that the learned judge ought not to have called upon the appellant to make his defence and ought to have acquitted him upon both charges at the close of the prosecution case. He would have been entitled to do so despite the language of reg 13 of the ESCAR: *PP v Sihabduin bin Hj Salleh & Anor* [1980] 2 MLJ 273.

Having given this appeal our most careful consideration, we are satisfied that the misdirections and non-directions by the learned judge, which are to be treated on the same footing as a misdirection or a non-direction by a judge to a jury, have occasioned a substantial miscarriage of justice within the meaning of that phrase as it appears in the proviso to

s 92(1) of the Courts of Judicature Act 1964. For present purposes it is unnecessary for us to trace the history of that proviso or the several cases in which it has been explained. However it is appropriate to quote from two Australian cases.

The first of these is *Mraz v R* (1955) 93 CLR 493 at p 514 where Fullagar J, when dealing with a similar phrase appearing in s 6(1) of the Criminal Appeal Act 1912 of New South Wales, said:

> It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

The second is *Ratten v R* (1974) 131 CLR 510 at p 516 where Barwick CJ, when speaking of the equivalent provision in s 568(1) of the Crimes Act 1958 of the State of Victoria said:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.

It is to be noticed that in each of these passages the reference to the trier of fact is a reference to a jury. But the principle does not alter where the trier of fact is a judge sitting alone and, as we have said a moment ago, a misdirection by a judge of himself is to be treated as a misdirection by a judge to a jury. It follows from what we have said thus far that the conviction of the appellant upon the two amended charges is plainly unsustainable. Accordingly, as earlier stated, we allowed the appeal, quashed the order of conviction, set aside the sentence and directed the immediate release of the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim